Supreme Court, U.S.
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No. 85-2087

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term 1985

MILTON M. LAWRENCE and
HELEN F. LAWRENCE

Petitioners,

vs.

ADVANCED PATENT
TECHNOLOGY, Inc., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the victim of a material omission should, as a matter of law, be taken to have relied on the person who withheld the information in an action for securities fraud under Rule 10b-5.

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Filed: March 26, 1986

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PETITION FOR WRIT OF CERTIORARI

The petitioners, Milton and Helen Lawrence, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on March 26, 1986. The respondents are: Advanced Patent Technology, a Nevada Corporation, Diversified Gaming and Technology, Inc., a Nevada Corporation, A.P.T. Financial Corporation, a Nevada Corporation, International Technical Development Corp., and Jack Solomon.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is attached hereto as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit, was entered on March 26, 1986 affirming judgment in the United States District Court for the District of Nevada against petitioners dated September 5, 1984. The jurisdiction of this court is invoked under 28 U.S.C. sec. 1254(1).

STATEMENT OF THE CASE

In April 1980 the SEC began a private investigation of APT with regard to its sale of unregistered stock. On May 2, 1980, APT and its president, Jack Solomon, received subpoenas from the SEC requesting documents to be used in the investigation (Appendix A, p.2). The subpoena requested 44 items. Solomon stated that it was very onerous and would take an "enormous amount of work" to comply with (RT 118-19, 162-64).

Thereafter, on May 16 and June 30, 1980, the Lawrences bought 50,000 restricted shares of stock in APT from Solomon. Solomon failed to inform the Lawrences of the investigation during the negotiations for the sale (Appendix A, p.2). He explained this lapse at trial with the statement, "I guess I just didn't think it was important (RT 165)."

On July 2, 1980, APT issued a press release describing the investigation. The Wall Street Journal of July 3, 1980 then published an article on the investigation (Plaintiffs'

Excerpt of the Record, p. 34, hereinafter ER). When the Lawrences first learned of this, in August of 1980, they made several efforts to rescind the sale, but to no avail (RT 68-73).

In its annual report for 1980, APT admitted that its actions in previous years "may have constituted violations of the registration and anti-fraud provisions of Federal and state securities laws." (Ex. 2).

On March 24, 1981, the National Association of Security Dealers de-listed APT stock. On March 30, 1981, the SEC suspended trading in it (ER 5). Having held the stock for the two years required by law, the Lawrences sold it in June 1982, incurring a loss of $122,500 (Appendix, p.2).

The Lawrences filed suit for fraud and violation of Rule 10b-5 in July 29, 1982. In its decision of September 5, 1984, the District Court entered judgment for defendants, "holding, inter alia, that the Lawrences had not relied on what Mr. Solomon said or did not say" (Appendix, p.2).

The Court of Appeals affirmed, holding that the presumption that the Lawrences relied on Solomon's omission had been rebutted. In the Court of Appeals' view, the presumption of reliance was rebutted by a showing that the Lawrences would have bought even if they had known about the investigation (Appendix, p.2-3).

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW RAISES THE SIGNIFICANT AND RECURRING PROBLEM OF WHETHER A SHOWING OF A MATERIAL OMISSION IN AN ACTION UNDER 10B-5 ESTABLISHES RELIANCE BY THE PLAINTIFF AS A MATTER OF LAW, OR INSTEAD ESTABLISHES ONLY A REBUTTABLE PRESUMPTION OF RELIANCE.

This Court held in *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972) that, in actions under section 10b-5 for failure to disclose information to investors,

> [P]ositive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision. . . . This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact.
>
> 406 U.S. at 153-54

This language clearly establishes that the plaintiff does not have the burden of proving reliance where materiality has been shown; it leaves open the question of whether a defendant responsible for a material omission can stave off liability for it by showing that the plaintiff, though deprived of material information, was not in any case relying on the defendant to make full disclosure to him.

There are two schools of thought on this issue. One, represented by the Ninth Circuit opinion on which Court of Appeals here relied *(Kiernan v. Homeland Inc.*, 611 F.2d

785 at 789 (1980)), holds that a showing of materiality establishes only a *presumption* of reliance, rebuttable if defendant shows that "plaintiff . . . would not have attached significance to the omitted facts, and therefore would have acted as he did if he had known the truth."

On the other hand, there is the view espoused by Judges Mansfield and Lumbard of the Second Circuit Court of Appeals. That view, originally stated by Judge Mansfield in his concurring and dissenting opinion in *Chris-Craft Industries v. Piper Aircraft Corp.*, 480 F.2d 341, 399- 400 (1973), rejects the "presumption" of reliance and takes the teaching of this Court in *UTE Citizens* to be that reliance is established "as a matter of law" once the materiality of an omission has been shown. Judge Lumbard, endorsing Judge Mansfield's view in *Herbst v. IT&T*, 495 F.2d 1308, 1316, footnote 14 (1974), pointed out that neither in *UTE* nor in its predecessor *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), had this Court "remanded . . . for the purpose of allowing defendants to raise a defense" after finding materiality. See also *Tucker v. Arthur Andersen 67 F.R.D.*, 468 at 479, footnote 19 (1975).

This Court should now affirm the Mansfield-Lumbard approach as essential to the achievement of the purposes of the Security and Exchange Act of 1934, and to the rules established under it.

> As this Court has already held, these laws
>
> embrace a "fundamental purpose . . . to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry." *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 . . . (1963) . . . . Congress intended securities legislation enacted for the

> purpose of avoiding frauds to be construed "not technically and restrictively, but flexibly to effectuate its remedial purposes."
>
> *Affiliated Ute Citizens v. United States*, 406 at 151, *supra*.

This philosophy can be made effective only by assuring sellers that they will be held to account for withholding material information from any investor, however sophisticated or unsophisticated they might believe that investor to be. *See TSC Industries Inc., v. Northway Inc.*, 426 U.S. 438, 449 (1976); Jacobs, *Litigation and Practice Under Rule 10b-5*, Section 61.02 (second ed., rev., 1985).

In the words of the Second Circuit Court of Appeals, Rule 10b-5 is

> founded on the principle that full and fair disclosure of all material facts must be made to investors so that they may have the benefit of the facts in making their investment decisions.
>
> *Sonesta International Hotels Corp. v. Wellington Assoc.*, 483 F.2d 247 at 249 (1973).

If sellers are assured that they cannot be held liable to investors they can show to be particularly sophisticated or skeptical, the deterrent force of the law will be severely diluted. Crucially, the effectiveness of this body of law depends upon ensuring that sellers must always take full responsibility for their conduct:

> The obligation is placed squarely on those making the offer in the first instance to disclose all material factors necessary to make their offer not misleading. That duty cannot be shifted to the shoulders of others.

Sonesta International Hotels Corp. v. Wellington Assoc., 483 F.2d 247 at 255 *supra.*

To allow this presumption of reliance to be rebutted is precisely to shift the duty from the shoulders of the sellers to those of investors. This amounts to the adoption of a subjective, rather than objective, standard of materiality, contrary to the decisions of this court. *See TSC v. Northway Inc.*, 426 U.S. 438, 449, *supra;* Jacobs, para. 61.02(b)(ii), 3-131. It gives the seller an opportunity to divert attention from his own wrongdoing by making the subjective state of mind of the investor the center of attention.

Such an approach "emasculate[s]" the purposes of the law, resulting in a virtual "nullification of the disclosure requirements of the act." *Sonesta International Hotels Corp. v. Wellington Assoc.*, 483 F.2d 247 at 255, *supra.* This consequence is apparent here. By giving the defendants the opportunity to disprove reliance, the trial court allowed Jack Solomon to distract it from the undisputed fact that Solomon consciously withheld relevant information from the Lawrences, information which, only a short time later, was important enough to publish in the Wall Street Journal (RT 165, ER 34).

Instead, the court focussed on evidence showing that Milton Lawrence was an "expert" in the law of restricted stock (ER 31-32, para. 8), that the Lawrences understood the risk they were taking in buying this stock (ER 32, para. 9), and that the Lawrences knew that Jack Solomon exaggerated and neither believed or relied upon anything he said (ER 33-34, paras. 11, 12, 15).

The irony of allowing such evidence to rebut reliance, and defeat liability, is particularly clear here. Because it was being looked at, not from the objective perspective of the public interest in full disclosure, but from the Lawrences'

supposed subjective point of view, the evidence of Jack Solomon's untrustworthy character was a positive asset to him, not the deficit it should have been.

Thus, as was to be expected from this approach, the victimized investors were put on trial in place of the seller who victimized them. The trial court found reliance to be refuted, in spite of the fact that Milton Lawrence made strenuous efforts to rescind the purchase as soon as he learned of the information which had been withheld from him (RT 68-73). Unable to rescind, the Lawrences were compelled to hold onto the stock for two years, the period required by law before restricted stock can be resold. Then, as soon as the law allowed, they sold the stock, at a nearly total loss (Appendix, p.2). The seller has now been allowed to profit from his wrongdoing, and the investors are without a remedy for their loss.

This case is, then, a perfect example of how securities legislation can be "emasculated" by allowing defendants to shift attention from their own conduct to that of the investors. Such emasculation must not be tolerated by this Court. It can be avoided through the adoption of the approach championed by Judges Mansfield and Lumbard: once it has been established that a seller of securities has withheld objectively material information from investors, the investors' reliance must be taken to be established *as a matter of law.* It must be made clear to the sellers of securities that they will be given no chance to avoid their responsibility for full disclosure. *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 399-400, *supra; Herbst v. IT&T*, 495 F.2d 1308, 1316, footnote 14, *supra, Cf., Lewis v. Walston & Co. Inc.*, 487 F.2d 617 (1973).

There are many thousands of investors like the Lawrences. In fact, there are many others around the

country who, like them, invested in APT restricted stock. By firmly establishing the doctrine that reliance cannot be rebutted, this Court can ensure that these investors will have a remedy for past wrongs, and that insiders will not be tempted to victimize them again in the future.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
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Respondents.

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SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Dated: September 5, 1984

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
Civil LV 82-387 RDF
Dated: September 5, 1984

CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
s/s Jackie Lowlett
DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MILTON LAWRENCE and HELEN LAWRENCE,

Plaintiffs,

vs.

ADVANCE PATENT TECHNOLOGY, INC. a Nevada corporation; DIVERSIFIED GAMING AND TECHNOLOGY, INC., a Nevada corporation; A.P.T. FINANCIAL CORPORATION, a Nevada corporation; INTERNATIONAL TECHNICAL DEVELOPMENT CORPORATION; JACK SOLOMON, and NORMAN VANCE,

Defendants.

Civil LV 82-387 RDF

JUDGMENT

This action having come on regularly for trial before the Honorable Roger D. Foley, sitting without a jury, and all parties having been represented by counsel, and all matters having been duly considered,

IT IS HEREBY ORDERED AND ADJUDGED that judgment be entered for the defendants and against the plaintiffs, and that defendants shall recover their costs.

DATED: September 5, 1984.

s/s Roger D. Foley
DISTRICT JUDGE

ENTERED
SEP 6 1984
CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY s/s Jackie Lowlett

SEP 6 4:10 PM '84
BY s/s Jackie Lowlett
DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MILTON LAWRENCE and HELEN LAWRENCE,

Plaintiffs,

vs.

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Defendants.

Civil LV 82-387 RDF

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on regularly for court trial on September 4, 1984, in the above-entitled court before the Honorable Roger D. Foley. All of the parties hereto, except Diversified Gaming and Technology, Inc., and Internation-

al Technical Development Corporation, appeared by and through their respective attorneys of record. The court received and considered the testimonial and documentary evidence presented and heard and considered the arguments of counsel. Good cause appearing therefor, the court hereby finds as follows.

FINDINGS OF FACT

1. Plaintiffs Milton and Helen Lawrence are and, at all times material hereto, have been residents of the State of California.

2. Defendant Gaming and Technology, Inc., (previously known as Advanced Patent Technology, Inc. and hereinafter referred to as "GTI") is a Nevada corporation with its principal place of business in this district.

3. Defendant A.P.T. Financial Corporation is a Nevada corporation which did not exist until 1981.

4. Defendants Jack Solomon and Norman Vance are and, at all times material hereto, have been residents of the State of Nevada.

5. The amount in controversy exceeds the sum of $10,000.

6. Defendants Diversified Gaming and Technology, Inc., and International Technical Development Corporation were not served with process and were dismissed on stipulation of counsel. Norman Vance was dismissed on stipulation of counsel.

7. Commencing in 1968, plaintiffs began buying common stock of GTI. Between 1968 and 1980, inclusive, plaintiffs bought and sold thousands of shares of the unregistered common stock of GTI.

8. Plaintiff Milton Lawrence is a lawyer and, during the first half of the 1970's, became an expert in connection with the law relating to purchases and sales of unregistered common stock.

9. At all times material hereto, plaintiffs understood the risk involved in purchasing and selling unregistered common stock and understood they were gambling.

10. At all times material hereto, plaintiffs knew that from its beginning GTI had never made a profit and that its only source of income was from the sale of unregistered common stock.

11. At all times material hereto, plaintiffs knew that defendant Jack Solomon exaggerated when talking about GTI and when communicating with plaintiffs concerning their purchase of shares of unregistered stock of GTI.

12. At all times material hereto, plaintiffs did not believe much of what defendant Jack Solomon said about GTI and its prospects.

13. In early 1980, plaintiffs sold shares of GTI's common stock they had bought earlier and realized a profit of about $140,000.

14. In May of 1980, plaintiffs purchased 25,000 shares of GTI's unregistered common stock for $62,500. In June of 1980, over the objection of plaintiff Helen Lawrence, plaintiff Milton Lawrence, on behalf of both plaintiffs, purchased an additional 25,000 shares of GTI's unregistered common stock for $75,000.

15. Neither plaintiff relied in any way on what defendant Jack Solomn said or did not say in connection with their decision to purchase the shares of GTI's common stock in May and June of 1980.

16. A private investigation by the Securities and Exchange Commission ("SEC") was begun in April of 1980, but no defendant knew the scope of that investigation before July of 1980.

17. On July 2 of 1980, GTI issued a press release indicating the existence of the SEC investigation. An article reflecting the investigation appeared in the July 3, 1980, edition of the Wall Street Journal. Announcement of the existence of the SEC investigation made no impact on the price of GTI's publicly-traded shares.

18. Before July of 1980, GTI submitted an application to the Nevada Gaming Control Board for a license with respect to a casino it was building on the Colorado River in Laughlin, Nevada, and the Gaming Control Board commenced a routine investigation in connection with the licensing application.

19. No defendant learned before mid-July of 1980 that the Gaming Control Board investigation also was focusing on Mr. Solomon personally and upon the sale of unregistered shares of GTI's stock.

20. During July and August, the existence of the Gaming Control Board investigation was public knowledge but had no impact upon the price of GTI's publicly-traded shares.

21. Before August of 1980, no defendant had any knowledge that the Gaming Control Board would request or require that Mr. Solomon resign as an officer of GTI as a condition to granting the license application with respect to the Colorado Belle.

22. GTI's fiscal year ends on September 30, and its 10-K is required to be filed by December 31 of each year.

23. The 10-K for the fiscal year ended September 30, 1980, was not timely filed.

24. On March 24, 1981, the National Association of Security Dealers de-listed the shares of GTI's common stock from public trading in the over-the-counter market because of GTI's failure timely to file the 10-K due on or about December 31, 1980.

25. On March 30, 1981, the SEC suspended from trading for ten days the publicly-traded shares of GTI for the same reason that the shares had been de-listed.

26. At all times material hereto, plaintiffs knew that any shares they purchased that had not been registered would have to be held for not less than two years and then could be sold only after compliance with certain requirements of the SEC.

27. No defendant misrepresented any material fact to either plaintiff in connection with their purchase of shares of GTI in May and June of 1980.

28. No defendant omitted to state any material fact necessary to make what had been said not misleading in connection with plaintiffs' puchase of shares of GTI's common stock in May and June of 1980.

29. No defendant had sufficiently verified for disclosure purposes information concerning the SEC investigation and the Gaming Control Board investigation before July 1, 1980. Any information held by any defedant relating thereto was not ripe for disclosure before July 1, 1980.

30. In connection with the purchase by plaintiffs of the common stock of GTI in May and June of 1980, no defendant acted with the intent to deceive or defraud either plaintiff, and no defendant acted recklessly in connection with such purchases.

31. The court does not find credible Milton Lawrence's trial testimony that had he known of the SEC investigation he would not have purchased shares in May and June, 1980.

32. This lawsuit was commenced more than two years after plaintiffs knew or, in the exercise of reasonable diligence, should have known the existence of the SEC investigation.

33. Plaintiffs have suffered no damage as a result of the conduct of any defendant.

From the foregoing facts, the court makes the following conclusions of law.

CONCLUSIONS OF LAW

1. The court has jurisdiction under Title 28 U.S.C. § 1332.

2. None of the information or facts known by any defendant at the time of plaintiffs' purchases of GTI's common stock in May and June of 1980 was material for disclosure purposes or ripe for disclosure.

3. No defendant acted with the scienter required to impose liability under state or federal law in connection with plaintiffs' purchases of GTI's common stock in May and June of 1980.

4. No conduct of any defendant was the proximate or direct cause of any loss by plaintiffs, or either of them.

5. There was no reliance by either plaintiff upon what any defendant said or did not say in connection with plaintiffs' purchase of shares of GTI in May and June of 1980.

6. No defendant is liable to either plaintiff under state or federal law.

7. Judgment shall be for the defendants, and the defendants shall recover their costs.

DATED: September 5, 1984.

s/s Roger D. Foley
DISTRICT JUDGE

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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A.P.T. FINANCIAL CORPORATION,
NEVADA CORPORATIONS

QUESTION PRESENTED

Whether a speculator whose alleged reliance has been disproven can establish a Rule 10b-5 violation?

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

LIST OF PARTIES

Respondent Gaming and Technology, Inc. ("GTI"), formerly known as Advanced Patent Technology, Inc., is a Nevada corporation; all of its subsidiaries are wholly-owned, and it is not a subsidiary of any corporation. Respondent A.P.T. Financial Corporation is a Nevada corporation and a wholly-owned subsidiary of GTI. Respondent Jack D. Solomon was the president of GTI at the time of the conduct complained of by petitioners Helen and Milton Lawrence.

Petitioners are wrong in contending that Diversified Gaming and Technology, Inc. and International Technical Development Corp. are respondents. Both were dismissed on stipulaton of counsel at trial. (Supplemental Appendix to Petition for Writ of Certiorari, Findings of Fact and Conclusions of Law (henceforth referred to as "Findings and Conclusions"), page 2, Finding 6).

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit is attached at Appendix A to petitioners' Petition. The District Court's Judgment and the District Court's Findings of Fact and Conclusions of Law are set forth in the subsequently filed Supplemental Appendix to Petition for Writ of Certiorari.

JURISDICTION

Jurisdiction is not disputed.

STATUTES INVOLVED

The Petition involves Section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and Rule 10b-5 (17 C.F.R. § 240.10b-5) promulgated thereunder.

STATEMENT OF THE CASE

The factual background of this matter is set forth in detail in the District Court's Findings and Conclusions. In summary, petitioners bought and sold thousands of shares of the unregistered common stock of GTI commencing in 1968; in early 1980, they realized a profit of about

$140,000.00. They understood the risks involved in purchasing and selling unregistered common stock and understood they were gambling. They knew that GTI had never made a profit and that its only source of income was from the sale of unregistered shares. They knew that Jack Solomon, then GTI's president, exaggerated in communicating with petitioners concerning their purchase of shares, and they did not believe much of what he said about GTI and its prospects. (Findings and Conclusions, pages 2-3, Findings 7-13).

In April of 1980, the Securities and Exchange Commission ("SEC") commenced a private investigation concerning GTI, but none of the defendants knew the scope of that investigation before July of 1980. (Findings and Conclusions, page 4, Finding 16). In May and June of 1980, the Lawrences purchased 50,000 shares of GTI's unregistered common stock, and the District Court expressly found that they did not rely in any way on what defendant Jack Solomon said or did not say in connection with their investment decisions. (Findings, page 3, Findings 14 and 15). On July 2, 1980, GTI issued a press release indicating the existence of the SEC investigation. A *Wall Street Journal* article reflecting the investigation appeared on July 3, 1980. Announcement of the SEC investigation made no impact on the price of GTI's publicly-traded shares. (Findings and Conclusions, page 4, Finding 17).

In July of 1982, the Lawrences brought an action for securities fraud based on the failure to disclose the pending SEC investigation. At trial, Mr. Lawrence testified that he would not have purchased the GTI stock if Mr. Solomon had told him about the SEC investigation. (Appendix A, page A-3). The District Court expressly concluded that none of the information or facts known by any defendant at

the time of plaintiffs' purchases in May and June, 1980, was material for disclosure purposes and that no defendant omitted to state any material facts necessary to make what had been said not misleading. The District Court expressly found Mr. Lawrence's testimony that he would not have bought the stock if he had known of the SEC investigation not credible. The District Court expressly found no scienter, no causation, no materiality and no reliance. (Findings and Conclusions, pages 5 and 6, Findings 27 through 31 and Conclusions 2, 3, 4, and 5).

The Court of Appeals for the Ninth Circuit in affirming the District Court focused only on the issue of reliance. The Court of Appeals discussed Mr. Lawrence's trial testimony to the effect that he was aware of the risks involved, was gambling, was aware that Mr. Solomon was "a drummer" and that he exaggerated, that Mr. Lawrence did not believe much of what Mr. Solomon said and that Mr. Lawrence had testified at his deposition that before the purchases he knew the SEC had raised questions about GTI's sale of restricted shares. The Court of Appeals noted the District Court's having expressly found not credible Mr. Lawrence's testimony that he would not have purchased the stock had he known of the SEC investigation. The Court of Appeals concluded that the District Court's finding that the plaintiffs would have acted the same had they known the truth was not clearly erroneous and affirmed without discussing the District Court's conclusions that plaintiffs had not established materiality, scienter, causation or damages.

REASONS FOR DENYING THE WRIT

1. Petitioners' Argument Is Predicated On A Finding Of Materiality And Ignores The Fact That The District Court Found An Absence Of Materiality.

Petitioners' entire argument is predicated upon an asssumption that the allegedly withheld information was material. In that regard, the Question Presented in the Petition is phrased in terms of a material omission, and the argument in the Petition likewise relates only to material omissions. The Lawrences either overlook or ignore the fact that the alleged omissions involved in this case were expressly found to be not material. (Findings and Conclusions, page 6, Conclusion 2). Accordingly, petitioners' entire argument is specious and must fail.

2. No Conflict Of Decision Exists Between The Second And Ninth Circuits.

Petitioners correctly recognize that the Ninth Circuit Court of Appeals has concluded that a rebuttable presumption of reliance arises upon a showing of materiality in a 10b-5 case. *Kiernan v. Homeland, Inc.*, 611 F.2d 785, 789 (1980). Petitioners then attempt to create an apparent conflict between the circuits by arguing that Judge Mansfield in his concurring and dissenting opinion in *Chris-Craft Industries v. Piper Aricraft Corp.*, 480 F.2d 341 at 399-400 (2nd Cir., 1973) suggested that reliance is established as a matter of law rather than pursuant to a presumption once materiality has been shown.

Petitioners overlook the fact that Judge Mansfield's view is not that of the majority opinion. (*See* 480 F.2d at 375).

They also ignore the fact that Judge Mansfield's view is not that of the Second Circuit. (*See, e.g., Lewis v. McGraw*, 619 F.2d 192, 195 (2ndCir., 1980)).

Petitioners attempt to bolster their argument by erroneously suggesting that in *Herbst v. I T & T*, 495 F.2d 1308 (2nd Cir., 1974) Judge Lumbard's reference in footnote 14 (495 F.2d at 1316) was an endorsement of Judge Mansfield's view. Judge Lumbard noted that both *Chris-Craft* and *Herbst* involved exchange offers in which the issue of reliance related to whether a large number of shareholders would have voted differently in approving exchange offers had they known of allegedly omitted material facts. In *Herbst*, Judge Lumbard pointed out that in the context of an exchange offer it would be extremely difficult to prove how shareholders in the aggregate would have reacted had they known of the omitted facts, but he did not hold or suggest that the presumption of reliance was conclusive.

Both *Chris-Craft* and *Herbst* are clearly distinguishable from this case. Herein, proof of the absence of reliance not only was practical but, more importantly, was established. Accordingly, any support that the Lawrences could have received from their interpretation of *Chris-Craft* and *Herbst* is illusory.

3. Petitioners' Urged Interpretation Of The Law Would Abolish Reliance As An Element Of A Rule 10b-5 Violation.

Herein, since reliance has been disproven, petitioners could prevail only if reliance were no longer an element of a Rule 10b-5 violation. Accordingly, they are arguing that it should be conclusively presumed once materiality (which

does not exist in this case) has been established. The effect of their urged interpretation is to abolish reliance as an element. While reliance may be difficult to prove or disprove in certain situations such as exchange offers or open-market transactions, it is readily susceptible of proof in factual situations such as this. Accordingly, causing the drastic change urged by petitioners is unnecessary. Moreover, since an obvious effect of such a change in the law would be to provide a fraud remedy to speculators like the Lawrences who were not defrauded, such a change is unwarranted and unwise.

CONCLUSION

For the above reasons, the Writ should be denied.

Respectfully submitted,

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